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Chapter 20: Workmen's Compensation

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CHAPTER 20

Workmen's Compensation

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§20.1. Compensable injury: Risk of unknown danger. Among the fourteen workmen compensation cases decided by the Supreme Judicial Court during the 1958 SURVEY year, only several can be said to have presented new concepts in this field of social legislation. The most interesting among these is *Baran's Case*.[1] An employee was unintentionally shot while leaving his employer's place of business at the close of the day's work and while on a part of the premises customarily used by the employees as an egress with the sanction of the employer. The bullet came from the rifle of a sixteen-year-old boy who was alone in his room in a house in the vicinity. At the time of the incident the boy was engaged in "aiming practice." No similar shooting had occurred in the neighborhood, and the employer had no knowledge that this boy or anyone else was in the habit of aiming firearms at its employees. The facts were agreed to by the parties. The single member noted in his decision that he was constrained by *Harbroe's Case*[2] and ruled that the employee's injury, although received in the course of his employment, did not arise out of the employment.[3] The review board and Superior Court affirmed.

In *Harbroe's Case,* decided in 1916, a night watchman, who was accidentally shot while on his employer's premises in an exchange of gunfire with police officers whom he had mistaken for robbers, was held not to have received an injury arising out of his employment. The decision was based, to a large degree, upon the absence of a special risk incident to the performance of the employee's duties. In *Baran's Case,* however, the Supreme Judicial Court held that the employee met with an injury arising out of and in the course of his employment in that the employment brought the employee in contact with the risk of being shot by the particular bullet that struck him. It thus reversed the decision of the Superior Court and awarded compensation.

The recent cases from the Supreme Judicial Court, as well as many

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§20.1. [1] 336 Mass. 342, 145 N.E.2d 726 (1957).
[2] 223 Mass. 139, 111 N.E. 709 (1916).
[3] G.L., c. 152, §26, as amended.

that have not been appealed beyond the Industrial Accident Board level, have negatived to a large extent the special-exposure-to-the-danger theory enunciated in *Harbroe's Case*.

The mere fact that the employee in *Baran* sustained the injury after the close of regular working hours would not preclude a recovery,[4] but the insurer argued that the nature of the injury precluded a finding that it arose out of the employment. Stress was laid by the insurer upon the lack of relationship between the employee's work and the injury, upon the extreme unlikelihood of such an injury, upon the absence of similar shootings in the neighborhood, and upon the lack of knowledge of the employer that anyone thereabouts had a habit of aiming loaded firearms at its employees or at other persons. The Court in answer stated that these considerations would be proper in assessing liability in tort but not in workmen's compensation.

Massachusetts has now for better or worse joined the minority of courts that make awards whenever the injury or death is caused because the employment required the claimant to occupy what later turns out to be a place of danger. The ratio decidendi of the Court cannot be seriously argued with, in view of the rule established in *Caswell's Case*[5] and reaffirmed in *Souza's Case*[6] and *Kubera's Case*.[7] In *Caswell's Case* the employee sustained injuries while at work when the wall of a building, subjected to the violence of a hurricane, fell upon him. The Court said, in finding the injury compensable under the Workmen's Compensation Act:

> Unquestionably the injury was received in the course of his employment. The only other requirement is that the injury be one "arising out of" his employment. It need not arise out of the nature of the employment. An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects.

It has been well established in England since at least 1917 [8] that, if an employee is hurt by contact with something directly connected with his employment, it will be considered a personal injury arising out of his employment even though the force that causes the contact was not related to his employment. This same principle has been applied in Massachusetts decisions. Compensation has been awarded to an employee at work who fell down stairs because of an attack of epilepsy; [9]

[4] Clifford's Case, 1958 Mass. Adv. Sh. 373, 148 N.E.2d 390; Warren's Case, 326 Mass. 718, 97 N.E.2d 184 (1951); Chouinard's Case, 325 Mass. 152, 89 N.E.2d 347 (1949); Roger's Case, 318 Mass. 308, 61 N.E.2d 341 (1945); Murphy v. Miettinen, 317 Mass. 633, 59 N.E.2d 252 (1945); Milliman's Case, 295 Mass. 451, 4 N.E.2d 331 (1936).

[5] 305 Mass. 500, 26 N.E.2d 328 (1940).

[6] 316 Mass. 332, 55 N.E.2d 611 (1944).

[7] 320 Mass. 419, 69 N.E.2d 673 (1946).

[8] Thom v. Sinclair, [1917] A.C. 127, 134-136.

[9] Cusick's Case, 260 Mass. 421, 157 N.E. 596 (1927).

to an employee falling into a machine because of a disease; [10] and to an employee who, because of illness, fell through a glass partition in a rest room at her place of employment.[11] These cases, however, must be distinguished from those in which an employee is stricken by a physical ailment, unconnected with his employment, which causes him to fall and to be hurt by contact with the ground or floor.[12] It has been held in these latter situations that the ground or floor plays a passive part in the injury and is not enough to connect the injury with the employment.[13]

Courts in the minority of jurisdictions have found the random bullet type of cases compensable but approached the problem in several different ways. The so-called street-risk doctrine, which was developed to encompass perils commonly found along the streets, such as snowy streets that cause accidents and slips to truck drivers, was in 1929 broadened by a California court [14] to include stray bullets. Using the same doctrine, the New York Court of Appeals, in 1922, found that an employee injured by a bomb dropped in Wall Street sustained a compensable injury.[15] Nearly all other states in which the random-bullet cases have been found to be compensable have dealt with them under the increased-risk test. An employee injured by a random bullet working in a rough neighborhood has been awarded compensation[16] as has an employee working in the woods who was shot by a deer hunter.[17] It should be noted that most jurisdictions other than Massachusetts have used the street-risk doctrine to enlarge the compensation coverage whereas in Massachusetts the street-risk doctrine has been applied to narrow the coverage afforded under the act.

With few exceptions, the most notable being the idiopathic fall cases,[18] the Supreme Judicial Court has accepted the premise that injuries that occur on the premises, or a death from a fall on steps while entering the employer's store to commence work,[19] or injuries sustained in lunch rooms on the employer's premises[20] as well as injuries occurring on company parking lots[21] are traumas arising in the course of the employment.

§20.2. Proof of injury: Necessity of medical testimony. Prior to *Lovely's Case*,[1] decided during the 1958 SURVEY year, it had been thought that medical evidence by a physician on the issue of the causal

10 Dow's Case, 231 Mass. 348, 121 N.E. 19 (1918).
11 Sullivan's Case, 241 Mass. 9, 134 N.E. 406 (1922).
12 Cinmino's Case, 251 Mass. 158, 146 N.E. 245 (1925).
13 Rozek's Case, 294 Mass. 205, 200 N.E. 903 (1936).
14 Frigidaire Corp. v. Industrial Accident Commission, 103 Cal. App. 27 (1929).
15 Roberts v. Newcomb & Co., 234 N.Y. 533, 138 N.E. 443 (1922).
16 Ex parte Rosengrant, 213 Ala. 202, 104 So. 409 (1925).
17 Arnested v. McNicholas, 223 Mich. 488, 194 N.W. 514 (1923).
18 Cinmino's Case, 251 Mass. 158, 146 N.E. 245 (1925).
19 Hallett's Case, 232 Mass. 49, 121 N.E. 503 (1919).
20 Charon's Case, 321 Mass. 694, 75 N.E.2d 511 (1947).
21 Roger's Case, 318 Mass. 308, 61 N.E.2d 341 (1945).

§20.2. 1 336 Mass. 512, 146 N.E.2d 488 (1957).

relationship of an original hernia was essential to establish a compensable claim.[2] Lovely worked for a bakery as a cook and dishwasher and, as part of his duties, was required to bring supplies from the basement to the bakery. On October 15, 1954, while carrying a 100-pound bag of sugar up the basement stairs, he felt pain in his right side. The pain continued that evening and the groin began to swell. On November 2, 1954 he was operated on for a hernia. Testimony was given by the employee that he never had swelling or pain in the groin prior to this accident. No medical testimony was offered in support of this claim. Upon completion of the employee's case the insurer rested without presenting any evidence. The single member found the claim compensable and awarded compensation. On appeal the reviewing board denied the claim by what was in effect a ruling of law, namely, that, upon the facts, disability entitling the employee to compensation could not be found in the absence of medical testimony. The Superior Court reversed the findings of the board and awarded benefits under the act; an appeal was taken by the insurer.

The Supreme Judicial Court in awarding compensation stated that its view found support in *Harrington's Case*.[3] However, a careful reading of that case will show that the employee sustained an aggravation of an already existing hernia whereas in *Lovely's Case* the issue was one of causation of an original hernia.

The Court apparently thought it necessary to note that "medical testimony is highly desirable in all cases and its absence is a proper ground for concern." Certain guideposts for the practitioner in future cases were established as criteria for dispensing with medical testimony to establish a causal relationship. They were indicated by the Court to be as follows: (1) close relationship in time between a sudden strain, the first symptoms and the hernia; (2) undisputed or uncomplicated facts; (3) the chain of causation must not be doubtful; (4) the question of medical causation must be comparatively simple and one that would be considered to be within the special knowledge of a lay member of an expert administrative board.

If the prudent insurer's attorney presents any substantial lay testimony to dispute the employee's testimony or medical evidence, of any substantial type, it is unlikely that the employee would prevail in the absence of medical testimony of his own. The burden of proof of the compensability of a claim rests upon the claimant[4] and the majority of the present members are reluctant to find a causal relationship between the trauma and the disability in the absence of medical testimony.

It is conceded that an expert commission, such as the Industrial Accident Board, should be allowed on the basis of their experience to supply some deficiencies in medical testimony and in some cases to reject medical testimony. There also exists a procedure by virtue of G.L., c. 152,

[2] Crowley's Case, 287 Mass. 367, 191 N.E. 668 (1934).
[3] 285 Mass. 69, 72, 188 N.E. 499, 500 (1933).
[4] Tartas's Case, 328 Mass. 585, 586, 105 N.E.2d 380, 382 (1952).

§9, which may be of assistance to the board member in evaluating complicated medical questions. This section provides:

> The division or any member thereof, may appoint a duly qualified impartial physician to examine the injured employee and to report. The fee for this service shall be a reasonable amount set by the division, and the insurer shall reimburse the division for the amount so paid. The report of the physician shall be admissible as evidence in any proceeding before the division or a member thereof; provided that the employee and the insurer have seasonably been furnished with copies thereof.
>
> No person shall qualify or remain qualified as an impartial physician who has testified in hearings under this chapter more than three times in the preceding twelve months, for either insurers or claimants or both unless by agreement of both parties. A report by a physician appointed as an impartial physician under this section, who at the time of his examination of the injured employee shall have testified in hearings under this chapter more than three times in the preceding twelve months for either insurers or claimants or both, unless by agreement of both parties, shall be null and void and not admissible in evidence.

If a board member is allowed to inject his own medical opinion on a causal relationship, in the absence of medical testimony, without at least recourse to an impartial examination as provided by Section 9, the rights of either the insurer or the employee may be prejudiced. The employee or insurer should be informed as to the basis of the commissioner's findings in sufficient time so as to counteract this opinion by the introduction of necessary medical evidence, just as they would deal with any other type of opposing evidence. In other fields of administrative law, the United States Supreme Court has repeatedly held that the evidence upon which a decision of fact is based must be in the record or identified therein with great particularity.[5] When an administrative body relies upon its own expert general experience the same rule applies.[6] While it has always been regarded as proper for an administrative officer of a quasi-judicial board to use the cumulative reservoir of his own expert knowledge in weighing and rejecting conflicting medical opinion, it is open to doubt whether the commissioner's own medical opinion should be enforced on the parties in the absence of expert medical testimony.

§20.3. Successive injuries: Liability of last insurer. In *McConologue's Case*,[1] the employee, while working for an employer insured by Liberty, fell fifteen feet from a ladder, injuring his back. The em-

5 United States v. Abilene & Southern Ry., 265 U.S. 274, 44 Sup. Ct. 565, 68 L. Ed. 1016 (1924).

6 Securities and Exchange Commission v. Chenery, 318 U.S. 80, 63 Sup. Ct. 454, 87 L. Ed. 626 (1942).

§20.3. 1 336 Mass. 396, 145 N.E.2d 831 (1957).

ployee was paid total compensation by Liberty until October 25, 1955. On September 27, 1955, an orthopedic physician found him disabled for his usual occupation as an iron worker but found he was able to do some light work. On October 24, 1955, at 8:00 A.M. the employee went to work for a second employer insured by American. At 9:45 A.M. the employee took an 80-pound tank up a ladder and, while carrying this tank, suffered a pain in his back and became further disabled. The single member and reviewing board found the second insurer, American, responsible for the payment of compensation. The Superior Court affirmed and American appealed. The Supreme Judicial Court held that there was sufficient evidence to establish a new injury on October 24, 1955, and held the second insurer, American, responsible for the payment of benefits under the act. Whether a new or second injury occurred is one of fact. Since the adoption of the Workmen's Compensation Act, the board's findings of fact are sustained unless they lack evidential support or are affected by errors of law.[2]

The rule as defined in *Evans's Case*,[3] that "[W]here there are successive injuries to an employee, the whole burden of compensation for the subsequent incapacity rests upon the one covering the risk at the time of the most recent injury that bears a causal relation to the disability," has never been varied. When incapacity results from several distinct injuries covered by different insurers, the injury causing final incapacity must be compensated by the insurer of the risk at the time of such injury, and is not apportioned among the various insurers. That the new injury was slight and very limited in its contribution to the disability is immaterial.[4] This same rule of affixing liability on the last insurer of the risk has been applied in silicosis,[5] asbestosis,[6] dermatitis[7] and chronic acid poisoning cases.[8]

Nothing is more firmly established in the workmen's compensation field than the rule that, when an industrial injury causes disability from a known or unknown latent prior condition such as back weakness, partial blindness, cancer, heart disease and the like, the entire disability is compensable. In all states that have the "full-responsibility" rule, as contradistinguished from the several states that have apportionment statutes, no weight is given to what part the pre-existing condition played in the final disability.

In *Long's Case*,[9] it was decided by the Supreme Judicial Court that a disabling increase in symptoms as a result of the stress and exertion of work was an injury within the purview of the Workmen's Compensation Act. The employee was disabled on four occasions and three successive insurers were involved. Phoenix was the insurer on August

2 Brek's Case, 335 Mass. 144, 147, 138 N.E.2d 748, 750 (1956).
3 299 Mass. 435, 437, 13 N.E.2d 27, 29 (1938).
4 Rock's Case, 323 Mass. 428, 429, 82 N.E.2d 616, 618 (1948).
5 Fabrizio's Case, 274 Mass. 352, 174 N.E. 720 (1931).
6 Donahue's Case, 290 Mass. 239, 195 N.E. 345 (1935).
7 Davis's Case, 304 Mass. 530, 24 N.E.2d 541 (1939).
8 Donahue's Case, 292 Mass. 329, 198 N.E. 149 (1935).
9 1958 Mass. Adv. Sh. 807, 150 N.E.2d 282.

16, 1955, the date of the last disability. In appealing the decision of the Superior Court which awarded compensation, Phoenix contended that there was no basis on which to find an injury occurred on August 16, 1955. The employee sustained his first injury on August 13, 1954. Again on November 11, 1954 the employee injured the same arm. During the period between August 13, 1954 and August 16, 1955, the employee testified his arm "went numb on him quite often;" he "had continual pain;" he had the same general symptoms in his arm periodically. There was medical testimony from only one physician. This medical witness testified that what happened on August 16, 1955 was only an exacerbation of the symptoms of the first injury and not a new injury. In essence the only medical witness in the case testified that what happened on August 16, 1955 was not an injury but merely an exacerbation of the syndrome. In *Lovely's Case*[10] compensation was awarded in the absence of medical testimony whereas in *Long* compensation was awarded in defiance of medical testimony negating an injury. The point involved in the decision had never been passed upon by any prior decision of the Court.

In recent years compensation has been awarded for a physical trauma,[11] emotional trauma,[12] and injury from shock in the absence of any trauma.[13] The cycle has now been completed by the decision of the Court in *Long's Case*,[14] which affirmed the power of the fact-finder to reject medical testimony and make an award on the strength of the claimant's testimony as to the sequence of facts pointing to causation. It is doubtful how far the Court will extend to the fact-finder the right to reject medical testimony and to rely upon lay testimony and administrative expertise. The Court in *Long*, as in *Lovely*, appeared to consider the medical question an uncomplicated one.

§20.4. Notice, claim and prejudice. The 1958 SURVEY year produced several cases involving notice[1] and claim,[2] the most significant of which was *Channell's Case*.[3] This was an appeal by the city of Haverhill, self-insurer, from a decree of the Superior Court enforcing a decision of the Industrial Accident Board that allowed the claim of the employee's widow for dependency compensation. The single member found that in June, 1952 the employee received an injury to his head when he was struck by the tailgate of a truck in the course of his employment. Although he complained of dizziness, he continued at work until July, 1952. On that date his foreman noticed he was unsteady on his feet and had difficulty operating the truck. The employee was

10 336 Mass. 512, 146 N.E.2d 488 (1957).
11 Caswell's Case, 305 Mass. 500, 26 N.E.2d 328 (1940).
12 Egan's Case, 331 Mass. 11, 116 N.E.2d 844 (1954).
13 Charon's Case, 321 Mass. 694, 75 N.E.2d 511 (1947). Compare Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897).
14 1958 Mass. Adv. Sh. 807, 150 N.E.2d 282.

§20.4. 1 G.L., c. 152, §41.
2 Id. §49.
3 1958 Mass. Adv. Sh. 367, 148 N.E.2d 370.

sent home and that night saw his family physician who advised hospitalization. In a few weeks surgery was performed for a subdural hematoma. The employee subsequently died. On medical testimony, it was found that the blow received by the employee "was adequate cause for the development of the . . . hematoma . . . and that . . . death was causally related to" the alleged injury. It was also found that the employee obtained adequate medical attention. There were apparently no witnesses to the accident. The alleged injury occurred in June or possibly early July, 1952. Medical treatment was rendered in July and August, with the employee's death occurring on August 16, 1952. There was conversation about the situation between the widow and the superintendent of highways three to four months after the employee's death. The claim was not filed until March 31, 1954. General Laws, c. 152, §41 provides:

> No proceedings for compensation for an injury shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury has been made within six months after its occurrence . . .

This section of the chapter must be read in conjunction with Section 44, which provides:

> Such notice shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury unless it is shown that it was the intention to mislead and that the insurer was in fact misled thereby. Want of notice shall not bar proceedings, if it be shown that the insurer, insured or agent had knowledge of the injury, or if it is found that the insurer was not prejudiced by such want of notice.

With regard to the period of time in which a written claim for compensation must be brought, Section 49 provides in part:

> Failure to make a claim within the time fixed by section forty-one shall not bar proceedings under this chapter if it is found that it was occasioned by mistake or other reasonable cause, or if it is found that the insurer was not prejudiced by the delay.

The Supreme Judicial Court in affirming the board found that the employee received good medical care promptly upon stopping work. The board found as a fact that substantially all witnesses, except the employee himself, were available to the insured when it first learned of the injury. The only prejudice that could have been found is the fact that the insured was not afforded the opportunity of a medical examination of the employee during his life. The board, however, from the evidence found that the medical, hospital and autopsy records gave the insured all the information that a prompt medical examination would have given.

In *Clifford's Case,*[4] also decided during the 1958 SURVEY year, the Court dealt with the situation in which the insurer had notice of the injury which occurred in 1952, but the insurer contended it was prejudiced by the employee's failure to file a claim until 1956. The employee fell downstairs while going out for a coffee period. She reported the incident to her supervisor but lost no time from work. She received no medical attention until she stopped work in September, 1955, although she had intermittent pain and trouble with her back during this period. The board found a lack of prejudice and awarded compensation.

The Supreme Judicial Court, in affirming the decision of the board, pointed out that the insurer did not make a physical examination of the employee until nearly eight months after the claim was filed. The Court also noted that the insurer was not prejudiced as it had an opportunity to participate in the diagnosis, treatment and examination. This ratio decidendi is open to serious doubt when it is borne in mind that the employee was admitted to a hospital in October, 1955, where a fusion was performed on her back, and it was not until February 13, 1956 that the employee first filed a claim for compensation. As a result of the spinal fusion operation the diagnosis was established. A medical examination by the insurer's physician subsequent to the operation would have been of little, if any, assistance.

The decision is not surprising as there was some evidence of lack of prejudice. Whether the burden of showing a lack of prejudice was sustained is a question of fact for the Board.[5] The decision of the reviewing board will be sustained by the Court if supported by any evidence.[6] In *Clifford's Case* the Court stated that the situation was different from that in *Russell's Case*[7] in which the injury complained of was an alleged aggravation of a heart ailment of which the self-insurer had no notice until ten months after the employee's death. Also distinguished by the Court was *Booth's Case*[8] in which prejudice was found when notice was delayed until seven months after the injury.

The question that continues to bother the Court is whether an otherwise meritorious claim should be barred for procedural reasons. The purpose of Sections 41 (notice) and 49 (claim) of G.L., c. 158 is exactly the same as any other limitation statute. If a notice is given long after an injury occurs, or a claim is filed a protracted period of time after the accident, the employer's ability to investigate successfully and to defend is unjustly curtailed. The statute has placed upon the employee the burden of proving that he gave notice as soon as practicable after the happening of the injury or, if no notice was given, then to show that the insurer, the insured or his agent had knowledge of the injury or that the insurer was not prejudiced by the

4 1958 Mass. Adv. Sh. 373, 148 N.E.2d 390.
5 Davis's Case, 304 Mass. 530, 24 N.E.2d 541 (1939).
6 Mastrogiovanni's Case, 332 Mass. 228, 124 N.E.2d 246 (1955).
7 334 Mass. 680, 138 N.E.2d 286 (1956).
8 289 Mass. 322, 194 N.E. 124 (1935).

want of notice.[9] There must be sufficient evidence to rebut the natural inference that the absence of notice might well be prejudicial to the insurer.[10] Whether the insurer was prejudiced by want of notice or failure to file a claim within the statutory time is generally held to be a question of fact for the determination of the Board.[11] As would be expected ignorance of the law is no justification for the failure to file a claim within the statutory period.[12]

Since the enactment of the Workmen's Compensation Act,[13] the Court has tempered the harshness of the statutory bar by recognizing various exceptions and waivers. In *DeFelippo's Case,*[14] the employer's physician diagnosed the employee's condition as a non-compensable disease which diagnosis was later found to be erroneous after the expiration of the statutory period; this was held to excuse the delay. Excuse for failure or delay in filing a claim for compensation was found in the following cases: when the employer had knowledge of the injury;[15] when treatment was rendered by the employer's physician;[16] when the employee considered the injury to be trivial but it later developed into a serious injury;[17] when a claim was filed 15 months after the injury when the claimant was then first informed by a physician that his injury arose out of his employment.[18] The Court has also held as a matter of law that seven years delay in filing a claim was not prejudicial.[19] Although the Court will attempt to prevent the forfeiture of compensation benefits, when there is a lack of notice or claim, when it can find that any reasonable ground exists, the requirement of notice "as soon as practicable" and the filing of a claim within the statutory period is not a mere technicality that may safely be disregarded.

9 In re Wheaton, 310 Mass. 504, 38 N.E.2d 617 (1942).

10 Hatch's Case, 290 Mass. 259, 195 N.E. 385, 107 A.L.R. 826 (1935); see G.L., c. 152, §44.

11 Perrotta's Case, 318 Mass. 737, 739, 64 N.E.2d 19, 20 (1945).

12 Booth's Case, 289 Mass. 322, 194 N.E. 124, 107 A.L.R. 819 (1935).

13 G.L., c. 152, initially enacted in Acts of 1911, c. 751.

14 245 Mass. 308, 139 N.E. 543 (1923).

15 Tingus's Case, 273 Mass. 453, 173 N.E. 518 (1930).

16 Johnson's Case, 279 Mass. 481, 181 N.E. 761 (1932).

17 Crowley's Case, 287 Mass. 367, 191 N.E. 668 (1934).

18 In re Wheaton, 310 Mass. 504, 38 N.E.2d 617 (1942).

19 Gaffer's Case, 279 Mass. 566, 181 N.E. 763 (1932).